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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA
12 FRESNO DIVISION
13

14 **DORA SOLARES,**

15 Plaintiff,

16 v.

17 **RALPH DIAZ, et al.,**

18 Defendants.
19

1:20-CV-00323-LHR

**NON-PARTY CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION'S RESPONSE
TO PLAINTIFF'S OPPOSITION (ECF
NO. 181)**

Judge: The Honorable Lee H.
Rosenthal

Action Filed: March 2, 2020
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1 Non-party California Department of Corrections and Rehabilitation responds briefly to
 2 Plaintiff Solares’s Opposition (ECF No. 181) to correct an error therein. Plaintiff states “it is a
 3 matter of black-letter law that *Perlman* does not apply in the civil context.” (Pl.’s Opp’n at 1,
 4 ECF No. 181.) Plaintiff is incorrect. *Perlman v. United States*, 247 U.S. 7, 13, (1918) does apply
 5 in civil matters, including this one.

6 In *In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1075-76 (9th Cir. 2015), a civil
 7 antitrust matter, Doe, a non-party, filed an interlocutory appeal regarding an order requiring
 8 production of confidential interviews of Doe by another non-party, the Antitrust Division of the
 9 United States Department of Justice. The Ninth Circuit held that it had jurisdiction under
 10 *Perlman* to consider whether the records that the USDOJ planned to disclose were privileged. *In*
 11 *re Optical Disk Drive Antitrust Litig.*, 801 F.3d at 1076 (“We have jurisdiction over this appeal
 12 pursuant to *Perlman v. United States*, 247 U.S. 7, 13, 38 S. Ct. 417, 62 L. Ed. 950 (1918).”).

13 In addition, in *SEC v. CMKM Diamonds, Inc.*, 656 F.3d 829, 830 (9th Cir. 2011), a civil
 14 action filed by the Securities and Exchange Commission, Gewerter, a non-party attorney, filed an
 15 interlocutory appeal to prevent another non-party, Bank of the West, from disclosing his trust
 16 account data. Again, the Ninth Circuit found it had jurisdiction to hear the interlocutory appeal
 17 under the *Perlman* doctrine. *Id.* at 831 (citing *Perlman* and stating “[I]n order to prevent the SEC
 18 from obtaining records relating to his trust account, Gewerter must be permitted to seek
 19 immediate review of the district court’s order denying his motion to quash”).

20 The Ninth Circuit, has applied, and does apply, the *Perlman* doctrine in civil cases.
 21 Plaintiff’s assertion that it is “black-letter law” that the Ninth Circuit does not do so is incorrect.

22 Plaintiff cites a 1988 Ninth Circuit case, *In re National Mortgage Equity Corp.*, 857 F.2d
 23 1238 (9th Cir. 1988), to argue that *Perlman* does not apply. The decision in *National Mortgage*
 24 *Equity* is not at odds with the later Ninth Circuit holdings in the *Optical Disk Drive* and *CMKM*
 25 *Diamonds* cases identified above.¹ In *National Mortgage Equity*, the Ninth Circuit found no
 26 jurisdiction for an interlocutory appeal because the party appealing, National Mortgage Equity

27 ¹ Indeed, the panel in *Optical Disk Drive* quoted *National Mortgage Equity*, indicating
 28 that the panel did not find the two decisions to be inconsistent. *In re Optical Disk Drive Antitrust*
Litig., 801 F.3d at 1076.

1 Corp. (identified as NMEC in the opinion) was the Defendant. *In re National Mortgage Equity*,
 2 857 F.2d at 1239. Therefore, NMEC could correct “any unfair use of the information or
 3 documents produced as a result of an improper order [by] appeal[ing] from final judgment in the
 4 case.” *Id.* at 1240.

5 By contrast, in *Optical Disk Drive* and *CMKM Diamonds*, the appellants were not parties to
 6 the case. *See in re Optical Disk Drive Antitrust Litig.*, 801 F.3d at 1074 (stating that appellant
 7 was “Interested Non-Party John Doe 1”); *CMKM Diamonds, Inc.*, 656 F.3d at 830 (identifying
 8 Gewerter as having represented Defendant Edwards “in earlier, unrelated matters”). Accordingly,
 9 they had no ability to appeal from a final judgment in the case, and an interlocutory appeal was
 10 appropriate. *See In re Optical Disk Drive Antitrust Litig.*, 801 F.3d at 1076 (holding that the
 11 *Perlman* doctrine applies “where a third party . . . must rely on another third party . . . to protect
 12 his interests in the discovery process”); *CMKM Diamonds, Inc.*, 656 F.3d at 830 (“Gewerter must
 13 be permitted to seek immediate review Otherwise he would be powerless to avert the
 14 mischief of the order.” (internal quotation marks omitted).)

15 Here, as in *Optical Disk Drive* and *CMKM Diamonds*, Osuna is a third party who cannot
 16 seek review of an order compelling production of these documents after judgment. Accordingly,
 17 he is entitled to seek interlocutory review of an order compelling production of his privileged
 18 documents under the *Perlman* doctrine. Any order compelling CDCR to produce Osuna’s
 19 psychotherapist-patient privileged documents should provide for notice to Osuna and enough time
 20 for him to appeal, should he choose to do so. Otherwise, the Court risks Osuna suffering
 21 irreparable harm from a disclosure that could affect his criminal case. *See In re Perez*, 749 F3d
 22 849, 854-855 (9th Cir. 2014) (finding that disclosure of identities of anonymous employees would
 23 “damage petitioner in a way not correctable on appeal”).

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1 It is understandable that Plaintiff's counsel would be mistaken on this issue as it is a
2 complicated area of law. But the fact remains, Plaintiff is incorrect, and the *Perlman* doctrine
3 applies in civil matters in the circumstances here.

4 Dated: June 30, 2025

Respectfully submitted,

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7 JON S. ALLIN
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9 */s/ Jeremy Duggan*

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CERTIFICATE OF SERVICE

Case Name: **Dora Solares v. Ralph Diaz, et al.**

No. **1:20-CV-00323-LHR**

I hereby certify that on June 30, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **NON-PARTY CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S RESPONSE TO PLAINTIFF'S OPPOSITION (ECF NO. 181)**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 30, 2025, at Los Angeles, California.

K. Vitalie

Declarant

/s/ K. Vitalie

Signature

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